No. 80-1020

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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RALPH W. ADAMS, *et al.*,
*Petitioners,*

v.

NICHOLAS E. D'ANDREA,
*Respondent.*

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**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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### COUNTER-STATEMENT OF THE CASE

Respondent Nicholas D'Andrea brought this action against petitioners, a state university and certain of its officials, alleging that his employment as a tenured assistant professor had been terminated, in violation of his constitutional right of free speech, because he had passed on to certain State officials information he had received from others indicating possible irregularities in the use of university funds. The case was tried before a jury, which returned a verdict for plaintiff. The court of appeals determined that the case was submitted to the jury with proper instructions, and that the evidence was adequate to support the verdict. It therefore reversed the judgment N.O.V. that had been entered by the district court, and directed entry of judgment for respondent.

Petitioners contend that the information communicated by respondent consisted merely of a "rumor . . . that Troy State University had caused some million dollars in currency to be flown to New York for an investment in the Alaska pipeline and then caused the currency to be returned some few weeks thereafter with a $400,000.00 profit." (Petition p. 3.) In fact, this was only one of several matters that respondent reported to the State officials. He also told them of information he had received from others that university funds had been transferred "from banks in which University officials had little interest to banks where University officials had considerable interest" (tr. 197), "that stock had been purchased by University officials with University funds" (*id.*), that university funds had been used to purchase equipment for the university's TV and communication system even though such equipment could have been obtained at no cost from a federal agency (tr. 197-98), that certain university officials had access to "slush funds" that "did not have to be accounted for" (tr. 199), and that cash payments had improperly been made to student athletes (tr. 200).

Respondent's statements were made at a time when a committee of the State Senate was preparing to hold hearings concerning the operation of various State agencies, including institutions of higher learning. (Tr. 6-8.) They were made to an examiner from the Department of Examiners and Public Accounts, an agency "charged by law with auditing all of the state agencies," which was at the time assisting the Senate committee in its work. (Tr. 8.) Respondent made clear at the time that the information he was passing on had been obtained from others, whom he identified, and that he had no personal knowledge of its accuracy.

Petitioners argued below, as they do here, that respondent's statements were false and made with reckless disregard for the truth. The court of appeals held, how-

ever, that this issue had been properly submitted to the jury, by an instruction that "a false statement made with reckless disregard of the truth . . . does not enjoy Constitutional protection and cannot be made the basis of a verdict for the plaintiff . . . ." (Pet. App. A20 n.2.) The jury's verdict indicated that the issue had been resolved in respondent's favor.

The court of appeals also observed, in an apparent dictum, that respondent's statements "cannot, on this record, be characterized as false" because respondent explicitly "identified his information as hearsay or secondhand. A statement that 'someone told me' or 'I have heard' certain information simply is not false—even if the information is inaccurate—unless the speaker has not in fact acquired the information from another." (*Id.* at A21 n.2.)

## ARGUMENT

Petitioners' principal contention at trial and in the court of appeals was that respondent's employment was not terminated because of his statements to State officials but purely for budgetary reasons. Now that this contention has been rejected by the jury and the court of appeals, however, petitioners fall back on what has heretofore been a distinctly subordinate issue in this case (that was disposed of by the court of appeals in a footnote), namely, whether respondent's utterances were knowingly false or made with reckless disregard of the truth.

This issue, however, presents no legal question that warrants this Court's attention. As the court of appeals pointed out, the matter was properly presented to the jury, which found for respondent.

Petitioners would have this Court hold, as a matter of law, that the information communicated by respondent was so "outlandish" and "farfetched" (Petition p. 4) that respondent could not have believed it to be true. But

issues such as the truth or falsity of a statement, or the state of mind of the speaker making the statement, are plainly questions of fact for a jury, not questions of law for a court. Petitioners cite this Court's observation in *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968), that "[p]rofessions of good faith" would not "be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." But the Court also stated, in the same paragraph of the same opinion, that [t]he *finder of fact* must determine whether the publication was indeed made in good faith." *Id.* (Emphasis added.) Here, "the finder of fact" has resolved that issue against petitioners.

It is therefore immaterial whether the court of appeals was correct in its view that a statement based on hearsay can *never* be false "unless the speaker has not in fact acquired the information from another." What is important here is that the question of whether *respondent's* statements were true or false, or made with reckless disregard of their truth, was submitted to the jury, and the jury found for the respondent. That is the end of the matter. There is nothing for this Court to review.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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